Vijayalakshmi Devi a/p Nadchatiram v Mahadevi a/p Nadchatiram

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–48 OF 2006(W)

ZAKI AZMI CHIEF JUSTICE, ALAUDDIN PCA AND ABDUL AZIZ MOHAMAD FCJ

23 FEBRUARY 2009

Civil Procedure — Appeal — Leave to appeal — Appeal against costs — Whether leave to appeal must be obtained — Whether issue of costs fell under trial judge's discretion — Whether appellate court ought not disturb findings of trial judge — Courts of Judicature Act 1964 s 68(1)(c)

The appellant was a contributor to a private limited company ('company') which was ordered to be wound up. An official receiver was appointed as liquidator of the company. The appellant, as a measure to protect a piece of land belonging to the company, lodged a private caveat over the land. The liquidator, by an ex parte application, removed the private caveat. The appellant applied to set aside the order of the ex parte application which was successfully opposed by the respondent and costs awarded to the respondent. The appellant therefore applied for a review of the decision of the deputy registrar of the High Court of Seremban who had subsequently recused himself from hearing matters pertaining to the case. The appellant argued that only the taxing officer who had presided over the hearing of the taxation of costs could preside over the review. The appellant awaiting the application for the review of the decision filed a summons in chambers in encl 256 to declare that the hearing and decision on bill of costs by the deputy registrar of the High Court of Seremban was null and void; and sought that it be heard de novo before another deputy registrar. However, the appellant's application in encl 256 was dismissed as, inter alia, that the allegation of bias by the deputy registrar of the High Court of Seremban was without basis or merit. The appellant appealed to the Court of Appeal which upon reviewing the law of interpretation of the equivalent s 68(1)(c) of the Courts of Judicature Act 1964 ('the CJA') surmised that the appeal related to costs only and hence was not competent as leave to appeal had not been obtained by the appellant. The issues in the present appeal were to determine whether on the facts the appeal was only as to cost or whether there were any other genuine grounds which the appellant was appealing against.

Held, dismissing the appeal with costs:

(1) (per **Zaki Azmi Chief Justice**, **Alauddin PCA** concurring) Where the trial judge in considering costs took into consideration materials which he should not have taken or based on facts which were not before him, then he could be said to have not exercise his discretion judiciously. Based on the authorities, s 68(1)(c) of the CJA was to be read in the manner that has been given to the interpretation of the corresponding provisions in the English legislation. The rationale behind s 68(1)(c) of the CJA is not to disturb the discretion exercised by the judges, in so far as costs is concerned. This is only proper for otherwise parties will drag on the case merely because they do not agree to the award of costs (see paras 14, 25–26).

(2) (per **Zaki Azmi Chief Justice**, **Alauddin PCA** concurring) A question of bias or impartiality was a question of fact and should not be disturbed at this appellate stage. The learned High Court judge had already ruled that he found no merit or basis that the deputy registrar was biased. The Court of Appeal ruled that the issue on bias was but a smoke screen to hide the true character of the matter under appeal which was against costs and therefore, the Court of Appeal was right in dismissing the appeal from the High Court as no leave was obtained (see para 29).

(3) (per **Abdul Aziz Mohamad FCJ**, dissenting) Where the appeal as to costs involves a question of law or principle no leave is required to appeal to the Court of Appeal against a judgment or order as to costs. In two instances no leave is required to appeal to the Court of Appeal against a judgment or order as to costs. One instance was where the appeal as to costs involved 'a question of law or principle' and the other was where the appeal as to costs was 'part of a larger appeal which includes other matters' (see para 40).

(4) (per **Abdul Aziz Mohamad FCJ**, dissenting) Although the law regarding the restriction in s 68(1)(c) of the CJA was correctly stated but it was not addressed as the appellant's stand was one where the appeal as to costs involved a question of law or principle. The question of bias was a question of law or principle. The question of jurisdiction was a question of law. The appeal therefore did not require leave (see paras 47–48).

[Bahasa Malaysia summary

Perayu merupakan penyumbang kepada sebuah syarikat sendirian berhad ('syarikat') yang diperintahkan untuk digulung. Seorang pegawai penerima telah dilantik sebagai pelikuidasi syarikat tersebut. Perayu, sebagai cara untuk

melindungi sebidang tanah yang dimiliki oleh syarikat tersebut, memasukkan kaveat persendirian ke atas tanah tersebut. Pelikuidasi, melalui satu permohonan ex parte, membatalkan kaveat persendirian tersebut. Perayu memohon untuk mengetepikan perintah permohonan ex parte yang telah ditentang dengan jayanya oleh responden dan kos diawardkan kepada responden. Perayu, oleh itu, memohon untuk semakan keputusan timbalan pendaftar Mahkamah Tinggi Seremban yang kemudiannya telah menarik diri daripada mendengar perkara-perkara yang berhubungan dengan kes tersebut. Perayu menghujah bahawa hanya pegawai pentaksir yang mendengar perbicaraan penetapan kos boleh mendengar semakan tersebut. Perayu sementara menunggu permohonan untuk semakan keputusan tersebut memfailkan saman dalam kamar dalam lampiran 256 untuk pengisytiharan bahawa perbicaraan dan keputusan terhadap bil kos oleh timbalan pendaftar Mahkamah Tinggi Seremban sebagai batal dan tidak sah; dan memohon bahawa ia dibicarakan de novo di hadapan timbalan pendaftar yang lain. Walau bagaimanapun, permohonan perayu di dalam lampiran 256 telah ditolak kerana, antara lain, bahawa dakwaan berat sebelah oleh timbalan pendaftar Mahkamah Tinggi Seremban adalah tanpa asas atau merit. Perayu merayu ke Mahkamah Rayuan yang selepas menyemak undang-undang pentafsiran yang setara dengan s 68(1)(c) Akta Mahkamah Kehakiman 1964 ('AMK') mengagak bahawa rayuan tersebut berkaitan dengan kos sahaja dan oleh itu tidak kompeten kerana kebenaran untuk merayu tidak diperoleh oleh perayu. Isu-isu di dalam rayuan ini adalah untuk menentukan sama ada di atas fakta rayuan hanya terhadap kos atau sama ada terdapat alasan-alasan sebenar yang lain yang perayu merayu terhadapnya.

Diputuskan, menolak rayuan dengan kos:

(1) (oleh **Zaki Azmi Ketua Hakim**, **Alauddin PMR** bersetuju) Sama ada hakim perbicaraan di dalam mempertimbangkan kos, telah mengambil perhatian terhadap perkara-perkara yang beliau tidak sepatutnya atau berdasarkan fakta-fakta yang tidak terdapat di hadapan beliau, maka beliau boleh dikatakan sebagai tidak melaksanakan budi bicaranya secara kehakiman. Berdasarkan autoriti, s 68(1)(c) AMK perlu dibaca dengan cara yang telah diberikan kepada pentafsiran peruntukan yang sama dalam perundangan Inggeris. Rasional di sebalik s 68(1)(c) AMK adalah untuk tidak mengganggu budi bicara yang dilaksanakan oleh hakim-hakim, setakat yang berkaitan dengan kos. Ini adalah wajar kerana, jika tidak, pihak-pihak akan melambat-lambatkan kes semata-mata kerana mereka tidak bersetuju dengan kos yang diawardkan (lihat perenggan 14, 25–26).

(2) (oleh **Zaki Azmi Ketua Hakim**, **Alauddin PMR** bersetuju) Persoalan berat sebelah atau adil adalah persoalan fakta dan tidak boleh diganggu

di peringkat rayuan ini. Hakim Mahkamah Tinggi yang bijaksana telah pun memutuskan bahawa beliau tidak mendapati merit atau asas bahawa timbalan pendaftar berat sebelah. Mahkamah Rayuan memutuskan bahawa isu berat sebelah hanyalah sekadar tabir untuk mengaburi sifat sebenar perkara yang dirayukan yang adalah terhadap kos dan oleh itu, Mahkamah Rayuan adalah betul dalam menolak rayuan daripada Mahkamah Tinggi kerana kebenaran tidak diperoleh (lihat perenggan 29).

(3) (oleh **Abdul Aziz Mohamad HMP** menentang) Di mana rayuan terhadap kos melibatkan persoalan undang-undang atau prinsip kebenaran tidak diperlukan untuk merayu ke Mahkamah Rayuan terhadap penghakiman atau perintah berkaitan kos. Dalam dua keadaan kebenaran tidak diperlukan untuk merayu ke Mahkamah Rayuan terhadap penghakiman atau perintah terhadap kos. Satu keadaan ialah di mana rayuan terhadap kos melibatkan 'persoalan undang-undang atau prinsip' dan satu lagi di mana rayuan terhadap kos adalah 'sebahagian daripada rayuan yang lebih besar yang termasuk perkara-perkara lain' (lihat perenggan 40).

(4) (oleh **Abdul Aziz Mohamad HMP** menentang) Walaupun undang-undang berkaitan dengan sekatan di dalam s 68(1)(c) AMK dinyatakan dengan betul tetapi ia tidak dijawab kerana pendirian perayu adalah sesuatu di mana rayuan terhadap kos melibatkan persoalan undang-undang atau prinsip. Persoalan berat sebelah merupakan persoalan undang-undang atau prinsip. Persoalan bidang kuasa adalah persoalan undang-undang. Oleh itu rayuan tersebut tidak memerlukan kebenaran (lihat perenggan 47–48).]

Notes

For cases on leave to appeal, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1105–1166.

Cases referred to

Anthony Lucas v The Malayan Cultures Co Ltd [1933] MLJ 21, CA (refd)
Bradford Thursby and Farish, Re [1884–1885] LR XV 635 (refd)
Civil Service Corporative Society Ltd, The v the General Steam Navigation Co Ltd [1903] 2 KB 756, CA (refd)
Crystall v Crystall [1963] 2 All ER 330, CA (refd)
Donald Campbell & Co Ltd v Pollak [1927] All ER Rep 1, HL (refd)
Metropolitan Asylum District (Managers) v Hill (1880) 5 App Cas 582, HL (refd)
Petroliam Nasional Berhad (Petronas) & Anor v Cheah Kam Chiew [1987] 1 MLJ 25, SC (refd)
Tan Thia Khwa and Cho Ban Hin Leong and Company v Tan Ee Tong and Chop Eng Huat [1935] 4 MLJ 282, CA (refd)

A *Westgate v Crowe* [1908] 1 KB 24, DC (refd)
Wheeler v Sommerfield & Ors [1966] 2 All ER 305, CA (refd)

Legislation referred to

Courts Enactment of the Straits Settlement 1918 s 17(c)
B Courts of Judicature Act 1964 s 68(1)(c)
Supreme Court Act 1981 [UK] s 18(1)(f)
Supreme Court of Judicature Act 1873 [UK] s 49
Supreme Court of Judicature (Consolidation) Act 1925 [UK] s 31(1)(h)

C *Malik Imtiaz Sarwar (Satha & Co) for the appellant.*
M Stanislaus Vethanayagam (Mahadevi Nadchatiram & Partners) for the respondent.

Zaki Azmi Chief Justice (delivering majority judgment):

D INTRODUCTION

[1] The deputy registrar at the High Court at Seremban awarded RM250,000 as costs for getting up in favour of the respondent. The appellant
E is of course not happy with it. The Court of Appeal decided that there were no genuine grounds of appeal and thus dismissed the appeal as no leave from the Court of Appeal had been obtained. The question that arises is whether there are any other genuine grounds of appeal apart from the order which allowed costs to be awarded. If there are any other genuine grounds of appeal,
F then leave of the Court of Appeal is not required. This depends on the interpretation of s 68(1)(c) of the Courts of Judicature Act 1964 ('CJA') which provides as follows:

Section 68 Non-appealable matters

G (1) No appeal shall be brought to the Court of Appeal in any of the following cases:

(a) ...;

H (b) ...;

(c) where the judgment or order relates to costs only, which by law are left to the discretion of the Court, *except with the leave of the Court of Appeal*; and

I (d) ...

(Emphasis added.)

[2] The following is the question before us.

> Whether the Court of Appeal was correct in law in the proper construction and meaning of s 68(1)(c) of the Courts of Judicature Act 1964 in construing the said section to encompass all matters pertaining to costs in the wider sense.

This was what James Foong JCA said in disallowing the appeal:

> The appellant's attempt to convince us that the order of costs involves law and principle and that it is part of a larger appeal are all, but a smoke screen to hide the true character of the matter under appeal. For this, it is necessary for us to be vigilant against such attempt to blur our vision from only hearing appeals which are competent.

BACKGROUND FACTS

[3] I now backtrack to understand the brief background of the case, which is as follows.

[4] A private limited company, Nadchatiram Realities (1960) Sdn Bhd, was ordered to be wound up on 5 September 1988 pursuant to an order by the Seremban High Court Companies Winding Up Petition No 42–02 of 1988. The appellant is a contributor to that company. An official receiver was appointed as liquidator of the said company. The appellant, in wanting to protect the piece of land belonging to the said company, lodged a private caveat over that land. The said caveat was successfully removed by way of an ex parte application by the liquidator. Thereupon, the appellant filed a summons in chambers (filed as encl 209) to set aside the ex parte order. The respondent (who is the second defendant in the winding up petition of the said company) opposed the appellant's application.

[5] Enclosure 209 was dismissed by the High Court at Seremban. Costs were awarded to the respondent. A bill of costs amounting to RM350,000 for getting up fee was filed by the respondent. The getting up fee was taxed down to RM250,000 by the deputy registrar. Discontented, the appellant filed an application for the earlier mentioned review against the deputy registrar's decision.

[6] While this was pending, the appellant on 15 January 2002 wrote to the Chief Judge of Malaya complaining that the deputy registrar was bias or impartial. The Chief Judge of Malaya replied to say that the appellant should formally apply for the deputy registrar's recusal. The deputy registrar, probably aware of the complaint, recused himself from hearing any matter connected to the Nadchatiram family.

[7] The matter was subsequently transferred to Kuala Lumpur by an order of the court dated 26 November 1996 and was re-registered in Kuala Lumpur

as Kuala Lumpur High Court Winding Up Petition No D5–21–179 of 2004. The order was only given effect on 3 November 2004. It is not clear why this was done but in any case, it is not relevant to the issue before us.

[8] While the application for a review against the deputy registrar's decision was still pending, the appellant filed a summons in chambers (encl 256) at the High Court at Kuala Lumpur to declare the hearing and decision on the bill of costs by the deputy registrar null and void and sought for it to be heard de novo before another deputy registrar of the High Court at Kuala Lumpur.

[9] The learned judge at the High Court at Kuala Lumpur dismissed encl 256 on 10 August 2005. In his decision, the learned judge reasoned that the allegation of bias by the deputy registrar was without basis or merit. Such allegation should be used as the basis for the appeal within the stipulated time and not to be raised after the matter had been transferred to Kuala Lumpur three years later. The learned judge was of the opinion that it was reasonable for the deputy registrar to fairly recuse himself because of the complaint letter sent to the then Chief Judge of Malaya and that there were indications that counsel for the appellant who appeared before the deputy registrar was rude in the sense that the deputy registrar was scolded, shouted and screamed at.

[10] Dissatisfied with this decision, the appellant appealed to the Court of Appeal.

[11] The Court of Appeal reviewed the law on interpretation of the equivalent s 68(1)(c) of the CJA of England to which the Court of Appeal concluded that the appeal before it 'relates to costs only and hence is not competent as leave to appeal has not been obtained'. Are they right in this conclusion?

[12] Now, the court has to decide whether on facts, the appeal is only as to costs or whether there are any other genuine grounds which the appellant is appealing against. If the court holds on the facts that the appellant is merely using the other grounds as a smoke screen in order to enable him to appeal on costs, then that appeal must be dismissed as leave had not been earlier obtained. In other words, was there a genuine appeal on substance? Was there a real basis to allege that the deputy registrar was bias? If there was, then the appellant has the right to appeal without leave. The appellant submit that since the deputy registrar was bias and impartial, he had not exercised proper judicial discretion.

THE LAW

[13] The following is the discussion on the law.

[14] Where the trial judge in considering costs took into consideration materials which he should not have taken or based on facts which were not before him, then he can be said to have not exercised his discretion judiciously. In *Donald Campbell Co Ltd v Pollak* [1927] All ER Rep 1, Lord Blanesburgh quoted the words of Lord Halsbury LC in *Civil Service Corporative Society Ltd, The v The General Steam Navigation Co Ltd* [1903] 2 KB 756 at p 765:

> No doubt where a judge has exercised his discretion upon certain materials which are before him, it may not be, and I think is not, within the power of the Court of Appeal to overrule that exercise of discretion. But the necessary hypothesis of the existence of materials upon which the discretion can be exercised must be satisfied. In the present case, so far as the evidence before me goes, *I can see no materials whatsoever upon which the learned judge could exercise a discretion at all.* … That is not exercising a discretion upon materials properly before the judge; but it is depriving a litigant of rights of which he is by law possessed, upon grounds which it is not competent for the judge to treat as grounds for the exercise of his discretion. Under these circumstances I am of opinion that the *cross-appeal must succeed, and that the defendants are entitled to their costs.* (Emphasis added.)

[15] Philmore J in *Westgate v Crowe* [1908] 1 KB 24 at p 27, also said that if a party has been deprived of its costs on a ground not warranted in law, than that is a determination of the judge in point of law. If the judge had in deciding costs exceeded his jurisdiction, then that decision does not fall within the limitation set by s 68(1)(c). This means an appeal that relates to costs survives only if the judge exceeds his jurisdiction.

[16] In the House of Lords decision of *Donald Campbell Co Ltd v Pollak* Viscount Cave LC revealed in his judgment:

> The result of my examination appears to me to be: (i) That there is no universal rule that an appeal as to costs only will not be entertained by this House, but the true rule is as stated by Lord Northington in *Cooper v Scott* (11), by Lord Eldon in *Tod v Tod* (1827) 2 Wils & S 542; 1 Bli NS 639, HL, and by Lord Selborne in *Metropolitan Asylum District (Managers) v Hill* (1880) 5 App Cas 582, as well as by Sir Joseph Napier in the judicial committee and by Lord St Leonards and Lord Cranworth in the appeal committee; and accordingly (ii) that in this House, as in the Court of Appeal, an appeal from a discretionary order as to costs will not be received, except, perhaps, in cases where there is also a bona fide appeal on merits; but (iii) that when it is alleged that the Court of Appeal in dealing with costs has fallen into error on a point of law which governs or affects costs, an appeal on that question will be heard. There are (as will have been seen) many cases in which an appeal under those conditions has been entertained, and there is no case in which such an appeal has been held to be incompetent.

[17] Lord Atkinson in the same case said that it is well established that when the decision of such a matter as the right of a successful litigation to recover his costs is left to the discretion of the judge who tried his case, that discretion is a judicial discretion. It has to be exercised on the facts of each case.

[18] In 1880, the House of Lords in the case of *Metropolitan Asylum District (Managers) v Hill* (1880) 5 App Cas 582, held that an appeal against the Court of Appeal's order to pay costs of the first trial as a condition for a new trial was not an appeal in respect of costs only and therefore ought to be entertained.

[19] In *Metropolitan Asylum District (Managers) v Hill*, Lord Watson said at p 586:

> I quite concede the propriety of the rule that the court of last resort ought not to entertain an appeal which involves nothing except the payment of costs, but it appears to me that that rule is limited to the case where the whole merits of the action or cause have been determined, and where the judges who have decided the cause have applied their minds to the right of the parties to receive an award of costs, looking to the whole circumstances and the conduct of the case; because it must be kept in view that the right to costs does not, in most cases, merely depend upon the merits of the cause as finally decided, but may, to a very great extent, depend upon the mode in which it has been conducted throughout by the parties. Accordingly, I think *it would be out of the question to require that the Court of Appeal should investigate not only the merits of the cause but the whole of the proceedings in the cause ab initio, for the purpose of ascertaining whether the discretion of the court below had been rightly or wrongly exercised.* (Emphasis added.)

[20] Lord Justice Bowen in the case of in *Re Bradford Thursby and Farish* [1884–1885] LR XV 635, at pp 636–637, in considering the issue as to whether the trial judge who awarded the costs had rightly decided that the solicitors against whom costs was awarded had been guilty of some misconduct or negligence said:

> Without fixing the precise limits to the exercise of the judge's discretion, we are of opinion that on the question whether there has or not been misconduct or negligence by the solicitor there ought to be an appeal …

[21] It will be noted that these authorities were all pre-1925. The Courts of Judicature Act 1873 was subsequently repealed and substituted by the Supreme Court of Judicature Consolidation Act 1925. As regards the interpretation of the section in the Supreme Court of Judicature Consolidation Act 1925 Lord Denning MR in *Wheeler v Sommerfield & Ors* [1966] 2 All ER 305 said:

The plaintiff appeals on that question of costs. It was said that he cannot appeal at all. The Supreme Court of Judicature (Consolidation) Act 1925, s 31 says:

> (1) No appeal shall lie... — (h) without the leave of the court or judge making the order, from an order of the High Court or any thereof made with the consent of the parties or as to costs only which by law are left to the discretion of the court.

It was said that, seeing that in the result the plaintiff has failed on the substantive points, this appeal comes down to an appeal as to costs only and, therefore, it is prohibited without the leave of the trial judge.

I do not agree with that interpretation. As I have always understood this section of the Act of 1925, it means this: if a person makes no complaint against the judgment below except about the order for costs, then he must obtain the leave of the trial judge before he can come to this court. If he makes a complaint, however, not only about the costs, but also about other matters, then he can appeal both on those other matters and also on the costs; and the court has full jurisdiction to deal with them. Even if he fails on other matters, this court has jurisdiction to deal with the costs. His complaint on the other matters must, of course, be genuine. That is what has happened in this case. The plaintiff has brought genuine complaints of other matters. He has also complained about the costs. Although he has lost on the other matters, nevertheless his appeal as to costs stands. It is within the jurisdiction of the court to consider it.

[22] Harman LJ, at p 311 had this to say:

> ... I think that the rule is as stated by Lord Denning MR. It cannot be right to say that the question of jurisdiction to deal with the costs depends on whether the appellant succeeds on some other issue in the action. Suppose he appeals on six points and he fails on five of them and there remains the sixth point, which is an appeal against the order as to costs. If the points that he has taken are genuine points, he can at the end appeal on the costs issue although his opponent has knocked out his other points one by one. If, of course, his appeal is as to the costs only or if the court should be satisfied that is all he really intended to appeal about and has put in the other issues as a kind of 'smoke screen', it may be that the court will refuse to entertain the real object of the appeal, which is in truth against the order as to costs only. If there is a genuine appeal of substance, the fact that it fails does not make it impossible for the court to go on and deal with the costs, provided of course that they are discretionary costs. If the costs are, for instance, executor's costs which are not discretionary, then the court does not have to look to see if there was leave below or not. That is the meaning of the words at the end of the rule about costs which are in the discretion of the court.

[23] That similar provision which appeared in s 49 of the English Supreme Court of Judicature Act 1873 and s 31(1)(h) of the Supreme Court of Judicature (Consolidation) Act 1925 has now been repeated in the new

Supreme Court Act 1981 appearing as s 18(1)(f). In Malaysia, it would seem that similar provisions appeared in s 17(c) of the Courts Enactment of the Straits Settlement 1918.

[24] Burton AG CJ (Straits Settlements) in *Tan Thia Khwa and Cho Ban Hin Leong and Company v Tan Ee Tong and Chop Eng Huat* [1935] 4 MLJ 282 also cited and followed *Donald Campbell & Co Ltd v Pollak*. In our Supreme Court in *Petroliam Nasional Berhad (Petronas) & Anor v Cheah Kam Chiew* [1987] 1 MLJ 25, Hashim Yeop Sani SCJ also followed *Donald Campbell & co Ltd v Pollak*.

[25] From this string of cases beginning from England and of course our own Straits Settlement and our Supreme Court judgments, it is clear that s 68(1)(c) of the CJA is to be read in the manner that has been given to the interpretation of the corresponding provisions in the English legislation. I have no hesitation in following that same interpretation.

[26] The rationale behind s 68(1)(c) of the CJA, as well as the English equivalent, in my opinion, is not to disturb discretion exercised by judges, in so far as costs is concerned. This is only proper for otherwise parties will drag on the case merely because they do not agree to the award of costs.

[27] The summary of the cases discussed above is that each ground of appeal raised must not be colourable and done with intent to color in order that the appellant could appeal on costs. In other words if the real reason for an appeal is to ask the appellate court to reconsider the order of the costs made (whether it is on the question that costs should be ordered or on the amount of costs awarded) then that appeal shall not be allowed. The question of 'whether the trial court has exercised its discretion properly' is not subject to appeal.

CONCLUSION

[28] Now let us look at the facts of the case before us. What has been pleaded is well spelt out earlier in this judgment. Basically, the appellant is challenging the bias and impartiality of the deputy registrar who awarded the costs to the respondent. I would not like to make any comment as to whether the costs awarded is properly exercised by the deputy registrar. But if the deputy registrar is found to be bias or impartial in coming to his decision, then of course his decision was not based on proper judicial discretion. His decision would therefore fall outside the scope of s 68(1)(c) of the CJA and the decision of the learned High Court judge at Kuala Lumpur who heard encl 256 is appealable to the Court of Appeal without the need to first obtain leave.

[29] A question of bias or impartiality is a question of fact and should not be disturbed at this level of appeal. The learned High Court judge has already ruled that he found no merit or basis that the deputy registrar was bias. The Court of Appeal ruled that the issue on bias was but a smoke screen to hide the true character of the matter under appeal which is against costs. It is our finding therefore that the Court of Appeal was right in dismissing the appeal from the High Court as no leave was obtained.

[30] This appeal is dismissed with costs.

[31] My learned brother Alauddin Dato' Mohd Sheriff PCA has read this judgment in draft and he concurs with me.

Abdul Aziz Mohamad FCJ (delivering dissenting judgment):

[32] For the facts, I can do no better than quote from the grounds of judgment of the Court of Appeal, which were written by James Foong JCA:

> The appellant is a contributory of a private limited company known as Nadchatiram Realities (1960) Sdn Bhd (the said fompany) that was wound up pursuant to an order made by the High Court at Seremban on 5 September 1988. The official receiver (liquidator) was appointed liquidator of the said company. The said company is solvent. Concerned that the liquidator was proceeding to dispose off a piece of landed property of the said company, the appellant lodged a private caveat over the same. The liquidator, by way of an ex parte application, successfully removed the said caveat. When the appellant became aware of this, she applied, by way of summons in chambers in encl 209, to set aside this ex parte order. The respondent (who is the second defendant in the winding up petition of the said company) opposed this application. She was successful and encl 209 was dismissed with costs awarded to her. Thereafter, the respondent filed a bill of costs claiming a sum of RM350,000 for getting up fee. On 4 January 2002, the getting up fee was taxed down to RM250,000. The Registrar of the court who taxed the bill of costs was one Tuan Mohd Nasir bin Nordin (Tuan Mohd Nasir). Dissatisfied with this decision, the appellant applied for a review of the registrar's decision. While this was pending, the appellant on 15 January 2002 wrote to the Chief Judge of Malaya complaining that Tuan Mohd Nasir was impartial and bias and should be disqualified from hearing any further matter on this case. The Chief Judge of Malaya replied to say that the appellant should make a formal application to the registrar for recusal. On 22 January 2002, a date fixed for assessment of damages for the removal of the caveat placed by the appellant, the registrar, Tuan Mohd Nasir, himself, perhaps having knowledge of the appellant's complaint against him, decided to voluntarily recuse himself from hearing all matters concerning the parties in this case and that of their families. Then on 1 March 2004, the Seremban High Court ordered that this case be transferred to the High Court at Kuala Lumpur. While the review of the decision of the registrar on the

bill of costs was still pending, the appellant filed an application (encl 256) seeking the following:

(1) The hearing and decision of the registrar Tuan Mohd Nasir on 4 January 2002 (the taxed bill of costs) be declared null and void.

(2) The bill of costs filed by the respondent be heard afresh before a registrar of the High Court at Kuala Lumpur.

James Foong JCA mentioned three other prayers in the appellant's application in encl 256, but I have omitted these as not necessary for my judgment.

[33] In his outline submission in the present appeal, the appellant's counsel said in para 4.1 that that application was 'to set aside the award of costs' of 4 January 2002. Although that was not exactly what prayers 1 and 2 sought, it was what prayer 1 amounted to, and if prayer 2 for a rehearing was granted, it would mean that the award of 4 January 2002 no longer applied.

[34] In the said para 4.1, the appellant's counsel said that the application was made on two primary grounds. One was 'a jurisdictional ground premised on the legal contention that only the taxing officer who had presided over the hearing of the taxation of costs could preside over the review. The taxing officer, the then deputy registrar, being unavailable due to, inter alia, his recusal, the review could not proceed and costs should be re-taxed on a de novo basis'. The other was that 'there was sufficient basis to conclude that there was a danger of bias on the part of the then deputy registrar. Amongst other factors, the sum of RM250,000 awarded for getting up to oppose an interlocutory application to set aside an ex-parte order was grossly excessive and wholly unreasonable having regard to the circumstances of the case as well as the trend in costs'. The learned judge at the High Court (Ramly Ali J) also recognised that those were the principal grounds of the application, although his manner of stating, at p 9 of his judgment, the ground of bias may create the impression that the alleged bias lay only in the fact that the award amounted to RM250,000. That is not so. At pp 10–13 of his judgment, the learned judge set out eight factors on which the appellant based her claim of bias, one of which was the amount of the award, which was said to be totally unrealistic and against all recent authorities.

[35] Each of those two grounds for setting aside the award of 4 January 2002 related to costs. By their respective nature, if the appellant succeeded on either one of the grounds, she would succeed in the application. If she succeeded on the ground of bias she would obtain prayers 1 and 2. If she failed on that ground but succeeded on the ground of jurisdiction, she would obtain prayer 2, and although she might not obtain prayer 1 because it may then be difficult to say that the award of 4 January 2002 was null and void,

the award, as I said, would no longer apply. It was therefore necessary for the judge to decide on each of the grounds.

[36] The learned judge dismissed the application upon several findings or views. First, there was no merit in the allegation of bias. Secondly, the allegation of bias should not have been brought by way of the application in encl 256 but should have been brought by way of an appeal to the judge in chambers. Thirdly, the award of RM250,000 was reasonable and not excessive. Brief reasons were given for this. Fourthly, there was no reason why the bill of costs should be heard afresh before a registrar of the High Court at Kuala Lumpur, but this does not appear to be a decision on the jurisdictional ground but appears to be a conclusion from the foregoing findings or views. There was no reasoning directed to the jurisdictional ground.

[37] Upon the appellant's appeal to the Court of Appeal, the Court of Appeal would have had to consider each of those four findings or views, and also the question of jurisdiction, as the merits of the appeal. But the Court of Appeal did not consider the merits of the appeal. They dismissed the appeal on a preliminary objection made by the respondent on the ground that no leave to appeal had been obtained by the appellant, whereas, according to s 68(1)(c) of the Courts of Judicature Act 1964, leave is required 'where the judgment or order relates to costs only, which by law are left to the discretion of the court'.

[38] The question on which leave to appeal to this court was granted is as follows:

> Whether the Court of Appeal was correct in law in the proper construction and meaning of s 68(1)(c) of the Courts of Judicature Act 1964 in construing the said section to encompass all matters pertaining to costs in the wider sense.

[39] It is not entirely clear to me what the question means when it says that the Court of Appeal construed s 68(1)(c) 'to encompass all matters pertaining to costs in the wider sense', but the Court of Appeal, speaking of the restriction imposed on appeals by the section after considering three cases cited by the appellant's counsel, namely, *Anthony Lucas v The Malayan Cultures Co Ltd* [1933] MLJ 21, *Crystall v Crystall* [1963] 2 All ER 330, and *Wheeler v Somerfield & Ors* [1966] 2 All ER 305, said as follows:

> But from the cases cited, this restriction does not apply to situation where the judgment or order as to costs involves law and principle or it is part of a larger appeal which includes other matters. We find this proposition sound and rational and reflects the current state of our law.

[40] As I understand the outline submission of the appellant's counsel in this appeal, he supported that statement as a correct statement of law. And I have no hesitation in saying so too. The Court of Appeal were right in that statement of law, except that I would modify it a bit so that, instead of saying 'where the judgment or order as to costs involves law and principle', I would say 'where the appeal as to costs involves a question of law or principle'. Depending on what the meaning of the words in the leave-question that I have mentioned is, that would be my answer to the question. It is important to note from that statement, as I would modify it, that in two instances no leave is required to appeal to the Court of Appeal against a judgment or order as to costs. One instance is where the appeal as to costs involves 'a question of law or principle'. The other is where the appeal as to costs is 'part of a larger appeal which includes other matters'.

[41] Despite having correctly stated the law as regards the restriction in s 68(1)(c), the Court of Appeal allowed the respondent's preliminary objection and dismissed the appeal. To the Court of Appeal 'the true character of the matter under appeal' was as an appeal to achieve 'the revocation of the registrar's order made solely on the issue of costs' and 'the appellant's attempt to convince us that the order of costs involves law and principle and that it is part of a larger appeal are all, but a smoke screen to hide the true character of the matter under appeal'. In support of the 'smoke screen' reason, the Court of Appeal cited a statement by Harman LJ in *Wheeler v Somerfield & Ors*.

[42] In that case the appellant had brought an action for libel, complaining of four passages in a long article in a weekly newspaper. Before trial, he amended by leave his statement of claim to add a para 2A alleging an innuendo from the entire article, giving a list of nearly one hundred articles that had appeared in the newspaper, none of which referred to him. In the trial, these articles were not admitted, and the defendants were given costs on para 2A. At the trial, the appellant also sought leave to amend the statement of claim so as to claim damages for injury to health, but leave was refused. He, however, succeeded on two of the four passages and was awarded damages and costs, but his costs came to less than the costs awarded to the defendants on para 2A, so that, in the words of Lord Denning MR, 'the plaintiff, who won the action, gets £29; and the defendants, who lost, get £391 14s 8d'.

[43] The appellant appealed on the questions of para 2A, of damages for injury to health, and of costs. He failed on the first two questions. When it came to the question of costs, it was argued that since the appellant had failed on the first two questions, which Lord Denning MR regarded as 'substantive points', the appeal amounted to an appeal as to costs only and was, as it was

without leave, prohibited by s 31(1)(h) of the Supreme Court of Judicature (Consolidation) Act 1925, which contained the same crucial words as in our s 68(1)(c).

[44] Lord Denning MR's answer to the objection was as follows:

> I do not agree with that interpretation. As I have always understood this section of the Act of 1925, it means this: if a person makes no complaint against the judgment below, except about the order for costs, then he must obtain the leave of the trial judge before he can come to this court. If he makes a complaint, however, not only about the costs, but also about other matters, then he can appeal both on those other matters and also on the costs; and the court has full jurisdiction to deal with them. Even if he fails on the other matters, this court has jurisdiction to deal with the costs. His complaint on the other matters must, of course, be genuine. That is what has happened in this case. The plaintiff has brought genuine complaints of other matters. He has also complained about the costs. Although he has lost on the other matters, nevertheless his appeal as to costs stands. It is within the jurisdiction of the court to consider it.

It should be noted that the 'other matters' in the passage were, in that case, the first two questions or substantive points, which had nothing to do with costs. It should also be noted that the appeal about costs would be good without leave, even if the appellant failed on the other matters, provided that the complaints of the other matters were, as Lord Denning MR found them to be, genuine complaints.

[45] Harman LJ's judgment, which was confined to the costs aspect of the appeal, was concerned to correct a suggestion that he had made to counsel and then to reinforce Lord Denning MR's opinion, particularly about the position where the other matters are not genuine complaints. It is here that he used the term 'smoke screen' that James Foong JCA used. This was what Harman LJ said, the statement that James Foong JCA cited being the last sentence:

> As to costs, I do not think that I was justified in the construction which I suggested to counsel, but I think that the rule is as stated by LORD DENNING MR. It cannot be right to say that the question of jurisdiction to deal with the costs depends on whether the appellant succeeds on some other issue in the action. Suppose he appeals on six points and he fails on five of them and there remains the sixth point which is an appeal against the order as to costs. If the points that he has taken are genuine points, he can at the end appeal on the costs issue although his opponent has knocked out his other points one by one. If, of course, his appeal is as to the costs only or if the court should be satisfied that that is all he really intended to appeal about and has put in the other issues as a kind of "smoke screen", it may be that the court will refuse to entertain the real object of the appeal, which is in truth against the order as to costs only. …

[46] I have earlier emphasised the two instances in which, according to James Foong JCA's correct statement of the law, no leave is required to appeal as to costs. It is clear to me that *Wheeler v Somerfield*, and Harman LJ's statement about 'smoke screen' issues, were about a case where the appeal as to costs is 'part of a larger appeal which includes other matters'. It is also clear to me that, by relying on Harman LJ's said statement for their decision to dismiss the appeal, the Court of Appeal considered the appeal as an appeal as to costs which was 'part of a larger appeal which includes other matters'.

[47] But the appellant's counsel says in the present appeal that was not the appellant's position. The appellant's stand was and is on the other instance, one where the appeal as to costs 'involves a question of law or principle', which the Court of Appeal mentioned but did not address.

[48] I agree that the appeal in the Court of Appeal was an appeal against a judgment or order as to costs which involved a question of law or principle. The question of bias is a question of law or principle. The question of jurisdiction is a question of law. The appeal therefore did not require leave.

[49] I would therefore allow this appeal with costs here and below and direct that the appeal be remitted to the Court of Appeal to be heard by a different panel on the merits. The deposit is to be returned to the appellant. I would also grant a stay in the manner earlier granted by this court pending determination of the appeal by the Court of Appeal.

Appeal dismissed with costs.

Reported by Mashrifah Ravendran